

May 6, 2003

## **The New Mexico Court of Appeals**

# **MEDIATION CONFERENCE PROCEDURES AND SUGGESTIONS FOR EFFECTIVE MEDIATION REPRESENTATION**

The Appellate Mediation Office conducts mediation conferences under Rule 12-313 NMRA 2003 and Ct. App. Order No. 1-24. The conferences are designed to reduce the time and expense of civil appeals by addressing any matter that may aid in their disposition. The conferences offer parties and their counsel confidential, risk-free opportunities to communicate about underlying interests, self-evaluate their cases, and explore possibilities for voluntary settlements with an informed, neutral mediator.

### **Case Selection**

Any civil matter pending before the Court is eligible except appeals in which one of the parties is incarcerated or in which a non-attorney is a pro se party<sup>\*</sup> and in cases involving the revocation of a driver's license, a petition for extraordinary relief, or an appeal arising out of the Mental Health and Developmental Disabilities Code and the Children's Code. The Mediation Office will select cases at random from the pool of eligible appeals, and other cases may be referred by the Court to the program either before or after briefing. Additionally, counsel for either party may request a mediation conference by contacting the Mediation Office in writing. Such requests will be kept confidential and generally accepted in any eligible civil appeal.

### **Conference Scheduling and Format**

Counsel receive a Mediation Conference Notice advising them of the date and time of the conference and whether it is to be held by telephone or in person. If a mistake is made or if it would better serve the purposes of the conference to have different or additional attor-

neys participate, notified counsel should promptly advise the office. The participating attorneys should be those on whose judgment the clients rely when making decisions. Anyone with an unavoidable scheduling conflict may ask that the conference be rescheduled; the Mediation Office will then provide one or more alternate dates and ask the attorney with the conflict to get the other participants to agree on a new date.

Most conferences are conducted by telephone, with the Court initiating the call, in order to make the process as inexpensive as possible. Participation is mandatory,<sup>\*</sup> meaning that lead counsel are required to participate in the process. Clients are welcome to participate actively in all phases of the mediation process. Opposing counsel are encouraged to discuss the value of having clients participate and of holding the conference in person. Clients may participate by telephone from locations other than an attorney's office. At the mediator's discretion, conferences may be conducted in person. In-person conferences are typically held at the Court of Appeals in Santa Fe and at the State Bar Center in Albuquerque.<sup>1</sup>

The mediator begins the conference by explaining the mediation process. He may inquire whether any procedural questions or problems can be resolved by agreement. Each side then discusses its perspectives on the conflict. Often, through an examination of the problem that goes beyond the appellate issues, the participants are able to identify important needs and values that underlie the dispute. The legal issues may be directly discussed. However, the purpose is not to decide or reach a conclusion about the merits of the appeal, but rather to facilitate an understanding of the issues and an evaluation of the risks and opportunities for each side. Candid examinations of the case can help the parties reach consensus on a settlement value.

Counsel should allow two hours for the initial conference. In some cases the discussions may go no further; in other cases proposals are generated that require further review. As a

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1. *Appeals in which one or more parties are not represented by counsel are not included in the mandatory program. However, a mediation conference may be scheduled in such cases where all parties, both those unrepresented as well as those represented, voluntarily consent to participate.*

result, the mediator may schedule follow-up conferences to fully pursue all opportunities for settlement.

## **Extensions of Time**

The times on appeal are not suspended upon notice of a mediation conference. However, the Court recognizes that a case's settlement potential may decline as substantial funds are expended on an appeal. In order to moderate such expenditures in appropriate cases while settlement is being considered, counsel are encouraged to orally request the mediator to grant an extension of time for filing proof of satisfactory arrangements for the cost of the transcript of proceedings and for filing briefs. Such requests may be made before, during, and after a scheduled conference. The mediator has complete authority to grant such extensions of time. No formal motions are required.

## **What Participants Can Expect**

The mediator typically probes for each party's underlying needs and interests in an effort to help the parties create and explore options for resolving the dispute. The mediator may lead a considered and sometimes detailed exploration of the cases' merits, depending on the extent to which the participants place importance on their ability to predict how the Court of Appeals would resolve the appeal. Additionally, the mediator also may invite discussion of related trial court cases, frequently in an attempt to achieve a global settlement of various lawsuits or proceedings.

## **What the Court Expects from Counsel**

Mediation is most productive when counsel are conversant with the pertinent facts and law in a case and are fully aware of their clients' interests, goals, and needs. Sessions are not productive when counsel present and maintain extreme positions and engage in hard, bottom-line bargaining. Counsel should obtain advance authority from their clients to make those commitments as may reasonably be anticipated. By developing and discussing a realistic view of the consequences of not reaching an agreement, counsel can obtain the authority to settle the case if the mediation results in a settlement opportunity that is

favorable to the client. Experience has shown that in most cases there is substantial movement from prior settlement positions. Counsel are strongly urged to consider having their clients present or available by phone at the time of the conferences.

## **Mandatory Participation--Voluntary Settlement**

Although mediation conferences are relatively informal, they are official proceedings of the Court and the Court may require all parties to participate. The mediation process is nonbinding, so no settlement is reached unless all parties fully consent.

## **Confidentiality**

The Court, by rule and verbal agreement of the parties at each conference, ensures that nothing said by the participants, including the mediator, is disclosed to anyone on the Court of Appeals or any other court that might address the case's merits. The Court will not reveal any request by counsel for mediation without the requesting party's permission. Ex parte communications are also confidential except to the extent disclosure is authorized. This confidentiality rule applies in all cases including those referred for mediation by a panel.

## **How to Prepare for a Mediation Conference**

- Prepare thoroughly (as if you were going to a hearing or a trial) with the ultimate goal of resolving the dispute in mind. Make a candid assessment of the respective strengths and weaknesses of both sides' legal positions. Be prepared to suggest an approach for the mediator to take in an attempt to settle the case (e.g. "problem" to be resolved, sequence of issues). Understand your client's priority of interests. Imagine creative solutions.
- Understand the rules of the Court and the role of the mediator.
- Advise the mediator if you believe it might be helpful to invite the participation of an entity who is not a party to the appeal.
- Consider contacting opposing counsel in advance of the conference as a means to establish a positive working relationship.

- Consider the principal-agent issues (e.g. incentives, roles, information) that may impact on each side's behavior.

## **The “Authority” Issue in Mediation**

- If “having the right person involved in the negotiation” has been a problem in the past, raise the issue with the mediator before the mediation session. Obtain a clear understanding of who will be present at the mediation and what authority they will have.
- If your client is a government or institution, understand the settlement approval process that applies and discuss your concerns and timetable issues with the mediator in advance.
- Understand whether the person has authority to decide or to “report and recommend” a proposed settlement to a superior.
- Have someone with authority present or available.

## **How to Work with the Mediator**

- Follow the mediator's cues. Anticipate questions such as: (1) What happened? (2) How do you feel about the situation and what underlying needs would you like have satisfied? (3) What do you want from the mediation in terms of priorities, interests, results?
- If the mediator asks you to restate a point, be patient. The mediator may be asking you questions for clarification or to elicit information that the other party needs to hear.
- Articulate legal, factual, and practical information that can be used to reality-test the other party's expectations.
- Use the mediator to point out settlement options and reality-test your client's expectations. Be candid and realistic about your “worst case.”
- Use the mediator to suggest your proposals or to offer proposals as options “not owned by anyone.”
- Confer with the mediator as to how or when to make proposals or settlement offers. Consider: What is your outcome analysis? What is a fair settlement analysis (range) in light of it? Is this a reasonable move in relation to where you have been and where you are going?

- Confer with the mediator as to the best strategy towards closure and whether and when it is advisable to offer a “bottom-line” figure or a “best and last” proposal.
- Use the mediator to guide you in ascertaining whether there are impasses that take time to work out or whether the other side is intractable and the mediation should be terminated. If you must deadlock, know precisely why you have been unable to settle and what must change before the impasse can be broken.
- Be patient and persistent. Each mediation has its own rhythm and pace.

## **The Role of Case Evaluation in the Mediation**

- Mediation is not designed for “deciding past rights and past wrongs”--that is more suitably the role of courts and arbitration. It is designed to help parties look forward to develop solutions for problems.
- After problems have become lawsuits there is often the desire by the parties and counsel to have a third-party tell them “how they are going to do” in the case. The mediator will address that desire in such a way that does not blunt the overall objectives of mediation and unnecessarily narrow the focus but rather gives the parties and counsel some assistance, or tools, for them to better evaluate their case. In this part of the mediation process “self realization is the best form of persuasion.”
- The mediator will not predict how the court will rule in a particular case, but rather attempt to clarify the tensions surrounding the issues on appeal.
- The mediator may provide objective court information--how the court operates. The mediator may discuss generally how a case gets assigned to a non-summary calendar, the probabilities of the case being decided by a formal opinion, time lines, and generic reversal rates.
- The mediator may discuss some of the court’s decision-making components such as the standards of review and preservation of error.
- The mediator may discuss the various outcome options and how they may relate to the course of the litigation: (1) So what if you win? (2) So what if you lose? (3) Where is the money? (4) Does a resolution of the legal issues solve your problem? (5) Are you potentially headed for an inconclusive result?

## **Elements of Effective Communication**

- A skillful presentation is not necessarily “conciliatory.” There is nothing wrong with stating all the reasons for settlement but at the same time communicating that you are prepared for a judicial resolution of the legal issues. The style and tone of your approach will have a substantial influence in persuading the other side to listen to you and to seriously consider what you are saying.
- Discuss the “common ground” that the parties may have in seeking to resolve the situation.
- Let your client speak if you believe it appropriate, and let your client respond directly to questions from the mediator or the other side, if you are prepared to do so.
- Effectively use what you have developed in prior proceedings: prior rulings, deposition testimony, key documents, and any admissions.
- Do not be antagonistic to the opposing party. Save your comments on personality problems and the conduct of parties or their counsel in the case for private discussion with the mediator.
- Do not “draw a line in the sand” in your initial comments.
- When opposing participants are speaking: let them talk without argument or interruption; consider this an opportunity to learn new facts; use this as an opportunity to have the other side describe “what it really wants” in the dispute rather than restate its legal position; ascertain if the other side has a hierarchy of true interests; look for common ground; assess the other party’s weaknesses; and listen carefully to what the other side is saying and even repeat back what the other side is saying to convince them that you have heard their position. If a settlement proposal is made at the conclusion of an initial presentation, do not reject it out-of-hand. Given the fluid nature of many mediations, lawyers and clients may be presented with settlement possibilities (or proposals) that they had not considered at the outset.

## **Private Conferences with the Mediator**

- Be clear about what information you expect the mediator to treat as confidential.
- Ask the mediator for more information about the other party’s position.

- Use this opportunity to (1) do reality checking with your client; (2) discuss expectations with your client; (3) explore your strengths and weaknesses in the case; (4) discuss the other party's needs or interests; (5) discuss what information the mediator can use to do "reality-testing" of other party's expectations and position.
- Use "downtime"--when the mediator is having a private conference with the other side--to review your client's interests in light of any new information and any historical information that may have become important and to "brainstorm" about possible solutions with your client and any co-counsel.

## **Mediation Don'ts**

- Don't prevent the mediator from talking to your client (even with you present) or from talking with all the parties.
- Don't be afraid to ask for a moment during the mediation to speak privately with your client.
- Don't base your settlement strategy on how well you are going to do in a particular court.
- Don't take a backward step. If you offered a specific dollar amount prior to mediation, but came to mediation with a lower amount in hand, you injure your credibility.
- Don't accuse the opposing party or their counsel of "bad faith" during a mediation just because their settlement posture did not live up to your expectation.
- Don't burn your bridges during mediation. Your case may take an unexpected turn for the worse as it develops, and you may wish to re-initiate settlement discussions.

## **Telephone Conference Mechanics**

The telephone mediation conference will be conducted using a commercial system that is accessible over any touch tone telephone. The following information is designed to let you know what to expect while using the system and to give you some navigation tips in advance. While most of this information will be repeated during the conference, it may be helpful to have this page handy.

After the mediator establishes personal contact he will "admit" you to the telephone meeting. The system will ask you to *very briefly* state your first and last name and press #. If



you are presented with a menu of additional options, press \_ to enter the main meeting. A recording of your name will be broadcast to those already in attendance and you will join them. Depending on the sequence of calls, you may have to wait for several minutes while the mediator calls and connects all of the necessary participants.

At some point during the conference the mediator may divide the participants into breakout sessions to enable private discussions. The mediator will instruct the participants to press #, \_, and then a number (1-9) for their specific breakout session. Once all the participants are present in a breakout session the mediator will lock the session by pressing #, \_, and \_ . (A breakout session can be unlocked by pressing the same keys -- #, \_, and \_ .) In order to take a roll call of the persons present and test for security, you may press #, \_, and \_ at anytime. To return to the main meeting from a breakout session, press #,\_, and 0.

Further information is available *from the Appellate Mediation Office, New Mexico Court of Appeals, Box 2008, Santa Fe, New Mexico 87504*. Telephone 505-827-3694. Fax 505-827-6642.